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SPECIFIC PERFORMANCE OF CONTRACTS— DEFENCE OF LACK OF MUTUALITY.

Seventh Paper.¹

THE DEFENCE MADE BY ONE WHO IS HIMSELF IN DEFAULT.

If A. and B. enter into a contract and B. cannot perform his part in full, he cannot, except where he fails in some mere detail, ask A. to perform. But B. is not allowed to set up this inability to obtain specific performance himself as a reason why A. should not require him to perform as far as he can. This rule is another exception to the principle that the remedy of specific performance must be mutual. It did not, however, grow up in our law as an exception to that principle, because it existed some years before the principle itself was distinctly stated. In the latter part of the eighteenth century Lord Thurlow went great lengths in forcing on vendees a less interest than they had agreed to buy, while of course allowing the defendant compensation for the defects. Thus it is reported that he once forced a vendee, who had contracted for the purchase of a house and wharf, to accept the house with compensation for the loss of the wharf, to which the vendor had no title.² If the vendor could in such cases force the vendee to accept, there was of course no reason why the vendee should not force the vendor

¹ The other papers will be found 49 A. L. R., pp. 270, 382, 445, 507, 509, and Vol. 50, pp. 65, 251.

² Cited in *Drewe v. Hanson*, 6 Ves. 675 (1802), 678, also in *Poole v. Shergold*, 1 Cox. Eq. 273 (1786), 274, where it is spoken of as the case of the Cambridge Wharf, and where the then Master of the Rolls, Lord Kenyon, regards it as a case, "contrary to all justice and reason." See also *Howland v. Norris*, or Lord Stanhope's Case, 1 Cox. Eq. 59 (1784); *Poole v. Shergold*, 1 Cox. Eq. 273 (1786); *Calcraft v. Roeuck*, 1 Ves. 221 (1790); *Fordyce v. Ford*, 4 Bro. C. C. Perk ed. 494 (1794). With the exception of the last case the plaintiff could so nearly fulfill his contract that they may be considered as falling under the modern rule permitting the vendor of real property to offer compensation for slight defects: see *infra*, note 15.

to fulfill his contract as far as he was able, with compensation for defective execution. Accordingly we find Lord Eldon, in *Mortlock v. Buller*,³ asserting that if the holder of a partial interest in an estate, "chooses to enter into a contract, representing it, and agreeing to sell it, as his own, it is not competent to him afterwards to say, though he has valuable interests, he has not the entirety; and therefore the purchaser shall not have the benefit of his contract."⁴ In short, at the beginning of the nineteenth century, partial specific performance with compensation to the vendee would be given either vendor or vendee, in case the vendor could not entirely perform his contract. Apart from any desirability of mutuality in the remedy, it is evident that the attempt of the vendor to make the vendee take less than he contracted to take may be regarded in a different light than the attempt of the vendee to make the vendor live up to his contract as far as he can. In the English cases, though this difference is not at first expressly alluded to, there is observable a steady inclination to grant specific performance to the vendee with compensation for the vendor's inability to completely perform,⁵ while, on the other hand, the cases constantly limit the power of a vendor, who cannot completely perform his contract, to compel the vendee to accept incomplete performance with compensation.⁶ So that in 1813 Lord Eldon could say that, "as to the question of compensation, it is true generally, but not universally, that the purchaser may take what he can get with the compensation for what he cannot have" while in the same year he decided in another case that a vendor who had sold an estate of one hundred and forty acres, free from tithes, could not have specific performance though he offered compensation to the vendee, "thirty-two acres not being free

³ 10 Ves. 292 (1804), 315, 316.

⁴ The case itself did not involve the question.

⁵ *Seaman v. Vawdrey*, 16 Ves. 390 (1810); *Hill v. Buckley*, 17 Ves. 394 (1811) (B. sold land to A. as 217 acres, 191 covered with wood, and there was only 191 acres, but all this was covered with wood).

⁶ *Drewe v. Corp*, 9 Ves. 368 (1804) (The plaintiff vendor sold land as freehold and he had only a term of four thousand years); *Ker v. Cloberry*, cited by counsel in *Binks v. Lord Rokeby*, 2 Sw. 223 (1818) (Estate sold tithe free and it was not).

from tithes."⁷ The first distinct statement of an English court, that specific performance would be denied to a vendee because of defects in the title, in a case where the vendee could have specific performance and compensation, occurs in 1818. The case is that of *Wood v. Griffith*.⁸ Lord Eldon said: "If a person in possession for a term of one hundred years contracts to sell the fee, he cannot compel the purchaser to take, but the purchaser can compel him to convey the term, and this court will arrange the equities between the parties."⁹

In America the right of the vendee to have specific performance of a contract for the sale of land, with compensation for defects, in a case where the vendor could not compel specific performance, was expressly recognized in a case decided in Kentucky as early as 1805.¹⁰ In 1812 the Supreme Court of New York, through Judge Spencer, speaking of the inability of the vendor to completely perform, said: "There is a settled distinction, when a vendor comes into a court of equity to compel the vendee to a performance, and when the vendee resorts to equity to compel a vendor to perform. In the first case, if the vendor is unable to make out a title as to part of the subject matter of the contract, which was the principal object of the purchaser, equity will not compel the vendee to perform the contract *pro tanto*."¹¹ For the distinction Judge Spencer cites "Sugden on Vendors and Purchasers,"¹² and it is probable that the young law stu-

⁷ *Paton v. Rogers*, 1 Ves. & B. 351 (1813), 352. In *Western v. Russell*, 3 V. & B. 187 (1814), 192, Sir Wm. Grant pointed out that the defence that the title is defective is new in the mouth of the vendor; saying further: ". . . the proposition is quite untenable, that, if there is a considerable part, to which no title can be made, the vendor is therefore exempted from the necessity of conveying any part." See also *Grant v. Munt*, Coop. Temp. Eldon, 173 (1815).

The case in which the vendor was plaintiff is *Binks v. Lord Rokeby*, 2 Sw. 223 (181), 225. Affirmed on another point, 2 Mad. 460, First Amer. ed. (1817). See also *Knatchbull v. Grueber*, 1 Mad. 153 (1815).

⁸ 1 Sw. 43 (1818), 54, 55.

⁹ Under the facts of the case the question was not directly involved.

¹⁰ *McConnell v. Dunlap*, Hard, Kty. 41 (1805). See also *Jones v. Shackleford*, 2 Bibb. 410, Ky. (1811).

¹¹ *Waters v. Travis*, 9 Johns. 450, N. Y. (1812), 465.

¹² First Eng. ed. 193 (1805).

dent and future Lord St. Leonards was the first person to call express attention to the distinction between partial specific performance at the instance of the vendee and at the instance of the vendor. Be this as it may, the distinction, as has been stated, was recognized on both sides of the Atlantic before the doctrine that in equity the remedy must be mutual was first clearly stated.¹³ That doctrine, therefore, was born with the exception that a vendor cannot set up his inability to obtain specific performance, arising out of his own failure to make a good title to the land sold, as a reason for resisting the desire of the vendee to have such title as the vendor can give him, with compensation for the defect. The right of the vendee to have specific performance and compensation under the circumstances indicated has been repeatedly recognized.¹⁴

¹³ Not stated in England until 1828; see article in 49 A. L. R. 270 (1901).

¹⁴ Some English cases not heretofore cited are: *Graham v. Oliver*, 3 Beav. 124 (1840) (In this case Lord Langdale indicates that he agrees with Lord Redesdale, note 19, *infra*, that partial specific performance should not be given, but feels bound by authority. See p. 128); *Nelthorpe v. Holgate*, 1 Coll. Ch. 203 (1844); *Peacock v. Penson*, 11 Beav. 355 (1848); *Jones v. Evans*, 12 Jur. Pt. 1, 664 (1848); *Powell v. The South Wales Ry. Co.*, 1 Jur., n. s., Pt. 1, 773 (1855) (The plaintiff also obtained indemnity. See p. 774); *Wilson v. Williams*, 3 Jur., n. s., Pt. 1 (810, 1856); *Hughes v. Jones*, 3 De G. F. & J. 307 (1861); *Powell v. Elliot*, L. R. 10 Ch. App. 424 (1875); *Leslie v. Crommelin*, L. R. 2 Eq. 154 (1867); *Barnes v. Wood*, L. R. 8 Eq. Cas. 424 (1869); *Hooper v. Smart*, L. R. 18 Eq. Cas. 683 (1874); *McKenzie v. Hesketh*, L. R. 7 Ch. D. 676 (1877); *Horrocks v. Rigby*, L. R. 9 Ch. D. 180 (1878); *Burrow v. Scammell*, L. R. 19 Ch. D. 175 (1881). Dicta in the following cases are to the same effect: *Frank v. Basnett*, 2 M. & K. 618 (1835); *Dyas v. Cruise*, 3 J. & L. 460 (1845); *Phelps v. Prothero*, 7 De G. M. & G. 722 (1855).

Some American cases are: *Nelson v. Carrington*, 4 Munf. 332, Va. (1813); *Rankin v. Maxwell*, 2 A. K. Marsh, 488, Ky. (1820); *Matthews v. Patterson*, 2 How. 729, Miss. (1838); *Leigh v. Crump*, Ired. Eq. 299, N. C. (1840); *Couse v. Boyles*, 3 Green's Ch. 212, N. J. (1842); *Blessing v. Beatty*, 1 Rob. 287 Va. (1842); *Jacobs v. Locke*, 2 Ired. Eq. 286, N. C. 1842; *Knowles v. McCamley*, 10 Paige, 342 (1843), 345; *Neal v. Logan*, 1 Grat. 14, Va. (1844); *Voorhees v. De Myer*, 3 Sandf. Ch. 614, N. Y. (1846); *Springle v. Shields*, 17 Ala. 295 (1850); *Harbers v. Gadsden*, 6 Rich. Eq. 284, S. C. (1853); *Young v. Paul*, 10 N. J. Eq. 401 (1855) (The plaintiff also obtained indemnity); *Wingate v. Hamilton*, 7 Ind. 73 (1855); *Clark v. Reins*, 12 Grat. 98, Va. (1855) 114, 115; *Collins v.*

On the other hand, unless the vendor fails in some mere trifling or unimportant particular, he cannot force the vendee to take, even though he offer him compensation.¹⁵

Smith, 1 Head. 251, Tenn. (1858); *Wright v. Young*, 6 Wis. 127 (1858); *Hazelrig v. Hutson*, 18 Ind. 481 (1862); *Erwin v. Myers*, 46 Pa. 96 (1863); *Davis v. Parker*, 14 Allen, 94, Mass. (1867); *Woodbury v. Luddy*, *ib.* 1 (1867); *Stockton v. Union Oil Co.*, 4 W. Va. 273 (1870); *Napier v. Darlington*, 70 Pa. 64 (1871); *Marshall v. Caldwell*, 41 Cal. 611 (1871); *Zebley v. Sears*, 38 Ia. 507 (1874); *Wilson v. Cox*, 50 Miss. 133 (1874); *Reese v. Hoeckel*, 58 Cal. 281 (1881) (If a mortgage could not be satisfied the plaintiff was to be secured. Question as to what the court means by secure; whether by reduction in the purchase price or by an indemnity); *Roberts v. Lovejoy*, 60 Tex. 253 (1883); *Swain v. Burnette*, 76 Cal. 299 (1888); *Lancaster v. Roberts*, 33 N. E. 27, Ill. (1893). It is admitted by dicta in the following cases: *Morss v. Elmen-dorf*, 11 Paige, 277, N. Y. (1844), at p. 287; *Bell v. Thompson*, 34 Ala. 63 (1859); *Smith v. Fly*, 24 Tex. 345 (1859); *Gibert v. Peteler*, 38 Barb. 488, N. Y. (1862), at p. 517; *Troutman v. Gowing*, 16 Ia. 415 (1864); *Harsha v. Reid*, 45 N. Y. 415 (1871); *Peters v. Delaplaine*, 49 N. Y. 362 (1872), 368; *Doctor v. Hellburg*, 65 Wis. 415 (1886); *McCord v. Massey*, 155 Ill. 123 (1895).

In the following cases specific performance with compensation is denied because of the impossibility of measuring the compensation, but the vendee was permitted to have specific performance without compensation if he so desired: *Westmacott v. Robins*, 4 De G. F. & J. 390 (1862) (Plaintiff did not want specific performance without compensation and cancelled the contract); *Clarke v. Renis*, 12 Grat. 98, Va. (1855), 114; *Humphrey v. Clement*, 44 Ill. 299 (1867), 301, 302; *Stern-berger v. McGovern*, 56 N. Y. 12 (1874).

In the following cases the plaintiff, not seeking compensation, succeeded in obtaining a decree directing the defendant to perform his contract as far as he was able to do so: *Neale v. Mackenzie*, 1 Keen, 474 (1837); *Bennett v. Fowler*, 2 Beav. 302 (1840).

The following are examples of cases where the discrepancy between the vendor's contract and his ability to perform was so great that the court refused to grant specific performance with compensation even at the instance of the vendee: *Wheatly v. Slade*, 4 Sim. 126 (1830); *Collier v. Jenkins*, You. 295 (1831); *The Earl of Durham v. Lord Legard*, 34 Beav. 611 (1865); *Chicago, Milwaukee & St. Paul R. R. Co. v. Durant*, 44 Minn. 361 (1890), 365; *Corby v. Drew*, 36 Atl. 827, N. J. (1897). On the other hand in *Corless v. Sparling*, 9 Ir. Eq. 595 (1875), specific performance was granted, but compensation to the plaintiff vendee denied, because of the trifling character of the defect.

¹⁵ *Magennis v. Fallon*, 2 Molloy, 561 (1828); *Nouaille v. Flight*, 7 Beav. 521 (1844); *Peers v. Lambert*, 7 Beav. 546 (1844); *Ridgway v. Gray*, 1 Mac. & G. 109 (1849); *Perkins v. Ede*, 16 Beav. 193 (1862);

Before dismissing the subject, it is perhaps proper to refer to a case which I have elsewhere treated at some length, *Lawrenson v. Butler*.¹⁶ There the defendant was possessed of an equitable life estate in real property. He had the right to lease with consent of the trustees for three lives or twenty-one years. He agreed to lease to the plaintiff for three lives. At the time of the contract both parties knew that the consent of

Evans v. Kingsberry, 2 Rand. 120, Va. (1823), 131; *Jackson v. Ligon*, 3 Leigh. 161, Va. (1831), 180; *Henry v. Liles*, 2 Ir. Eq. 407, N. C. (1842), 417 (*Dicta*); *Buchanan v. Alwell*, 8 Hump. 516, Tenn. (1847), 519; *Cunningham v. Sharp*, 11 Hump. 116, Tenn. (1850), 121. For the earlier cases under this head see note 5 *supra*.

In the following cases specific performance was refused the vendor because he could not fully perform, but the question of compensation was not discussed: *Hick v. Phillips*, Finch, Pre. Ch. 575 (1721); *King v. King*, 1 M. & K. 442 (1833); *Barton v. Downes*, Flan. & Kel. 505 (1842); *Martin v. Cotter*, 3 J. & L. 496 (1846); *Reed v. Noe*, 9 Yerg. 283 Tenn. (1836); *O'Kane v. Kiser*, 25 Ind. 168 (1865); *Howard v. Kimball*, 65 N. C. 175 (1871); *Dyker Meadow Land Imp. Co. v. Cook*, 159 N. Y. 6 (1899).

In the following cases the vendor was held to be able to substantially perform his contract and entitled to specific performance with compensation to the vendee for the slight defect: *Esdaile v. Stephenson*, 1 S. & S. 122 (1822); *Smith v. Tolcher*, 4 Russ. 302 (1828); *Hanbury v. Litchfield*, 2 M. & K. 629 (1835) (The fact that the vendee ought to have known the vendor's power to lease depended on the lord of the manor alone enabled specific performance with compensation to be obtained). For the early English cases under this head see note 2 *supra*.

The American cases appear to be more numerous: *Hepburn v. Auld*, 5 Cr. 262 U. S. S. C. (1809), 278 (*Dicta*); *Stoddart v. Smith*, 5 Binn. 355 Penn. (1812), 362, 363; *King v. Bardeau*, 6 Johns. Ch. 38, N. Y. (1822); *Guynet v. Mantel*, 4 Duer, 86 N. Y. (1854); *Spalding v. Alexander*, 6 Bush. 160, Ky. (1869), 167 (The facts show that the vendee took possession with knowledge of defect); *Foley v. Crow*, 37 Md. 51 (1872). 61, 62 (Same as previous case); *Creigh v. Boggs*, 19 W. Va. 240 (1881), 252, 253; *Beck v. Bridgman*, 40 Ark. 382 (1883) (Possession was taken here also after knowledge of defect, see p. 389); *Towner v. Tickner*, 112 Ill. 217 (1885). The principle of compensation for minor defects is admitted in the following cases: *Beyer v. Marks*, 2 Sw. 715 N. Y. (1870), 722; *Smyth v. Sturges*, 108 N. Y. 495 (1888), 502. In *Brooke v. Rounthwaith*, 5 Hare, 298 (1846), the vendee seems to have failed to obtain specific performance, because the defect, which consisted in the smallness of certain trees, the sale being of timber lands, could not be properly measured in damages. Pp. 303, 304. See also *Phillips v. Stauch*, 20 Mich. 369 (1870), 383.

¹⁶ 1 Sch. & Lef. 13 (1802); Third Paper, 49 A. L. R. 454 (1901).

the trustees was necessary to enable the lessor to grant the lease. The trustees refused. The plaintiff brought his bill for specific performance, and his counsel in the course of the argument stated their client's willingness to accept such a lease as the defendant could give; that is a lease void against issue male. Lord Redesdale dismissed the bill. His opinion discloses three grounds for this action. One is that if we regard the contract between the parties as practically one in which Lawrenson was only obliged to take a good title, but Butler was obliged to convey any title he had at the option of Lawrenson, then a court of equity would have nothing to do with such a bargain. It will be noticed that this idea would practically prevent a vendee from obtaining partial specific performance, provided the contract was executory on both sides, where his vendor was unable to convey a good title. Thus to this extent the case may be regarded as overruled.¹⁷ But it is important to note that the reason for Lord Redesdale's position is not want of mutuality in the remedy but in the obligation. I have, as stated elsewhere, discussed this phase of the case.¹⁸

Another ground for the decision is that "the parties,"

¹⁷ The position indicated as taken by Lord Redesdale in *Lawrenson v. Butler*, he apparently again takes in *Harnett v. Yeilding*, 2 Sch. & Lef. 549 (1805), 554. This last case may be considered as standing for the proposition that a court of equity will not give specific performance at the instance of the vendee of real property, where the vendor cannot convey a good title and nothing has been done under the contract. As stated, on this point, the case is no longer law. The position of Lord Redesdale was adopted by Judge Gibson in *Clark v. Seirer*, 7 Watts, 107 Pa. (1838), 110, 111, in a case where the vendee sought compensation for the refusal of the wife of the vendor to join. The Supreme Court of the state has followed Judge Gibson's decision on the particular facts, but on other grounds: See *infra*, note 19.

¹⁸ First Paper, 49 A. L. R. 276 *et seq.* It is in strict accordance with the idea that the reason why a court of equity will not touch such a contract is because, while perhaps good at law, it may lack sufficient mutuality of obligation to make it suitable for enforcement in a court of conscience that Lord Redesdale qualifies his denial of equitable relief by pointing out that, if there is any inequitable conduct on the part of the vendor which has led the vendee into a position from which he cannot be extricated, then equity would give relief: 1 Sch. & Lef. 18; 2 Sch. & Lef. 557. See also Lord Bolingbroke's case, cited in a note to 1 Sch. & Lef. 19.

knowing of the settlement, "entered into a scheme for the purpose of defeating the provisions of that settlement. It would lead us too far afield to discuss this question of the fraud on the settlement. The last ground is that the agreement was entered into under the supposition that both were bound, and as Lawrenson was not bound neither were bound, the agreement being entered into under a mistake. In regard to this reason, it is doubtful whether either party thought Butler able to compel the trustees to convey. The mistake if any was one of fact in regard to the willingness of the trustees. This mistake would not have been a cause for setting aside the contract if Lawrenson was considered to have warranted his ability to obtain the consent of the trustees. Lord Redesdale, therefore, must mean that Lawrenson contracted to convey provided the trustees would consent, and his reasoning apparently stands for the proposition that he who agrees to convey land to one who knows at the time the contract was entered into that the vendor neither has a good title or the legal power to obtain a good title, does not break his contract unless he obtains a good title and then refuses to convey. In other words, that the real contract between the parties, where the vendee knows of the defect in the vendor's title, is for the sale of the land provided he, the seller, can obtain a good title from a third person. Looked at in this way, the case of *Lawrenson v. Butler* does not stand for any principle in respect to the specific performance of contracts; but, on the other hand, it does stand for a very important interpretation of the meaning of a class of contracts for the sale of real property. In the note I have tried to show the different ways in which the fact that the vendee knows of the defect in the vendor's title may affect the interpretation of the meaning of the contract. A reference to this note will show that Lord Redesdale's interpretation of the meaning of the contract in the case before him has been generally followed, or perhaps it would be better to say, has never been distinctly repudiated.¹⁹ The cases discussed in

¹⁹ NOTE ON THE OBLIGATION OF THE VENDOR OF REAL PROPERTY WHEN THE VENDEE KNOWS AT THE TIME OF THE CONTRACT THAT THERE IS A DEFECT IN THE VENDOR'S TITLE.

If A. agrees to buy land from B., and at the time of entering into the

the note are often mistaken for cases dealing with partial specific performance. It must be confessed that the language used by the courts in some of the cases lends color to the idea

contract A. knows there is some physical defect in the land, he must be regarded as agreeing to take the land with that defect. Physical natural defects cannot be removed, and the vendor will not be supposed to have undertaken an impossibility. If the physical defect is in the improvements erected on the land, the vendor is not supposed to rebuild or put in repair before conveyance. A vendee, who knows the condition of the property and who desires to fasten an obligation to repair on the vendor, must do so by express words. But if there is a defect in the title of the vendor, and the vendee knows of this defect at the time the contract is made, then it is possible to consider the contract in one of three ways. First: it may be a contract in which the vendor undertakes to obtain a good title to the land and convey the same to the vendee. Second: the agreement may be regarded as a contract to convey the imperfect title which the vendor has at the time of the contract. Third: the agreement may be regarded as a contract in which the vendor promises to convey, provided he obtains a title. It is, as pointed out in the text, from this last point of view that Lord Redesdale regards the contract in *Lawrenson v. Butler*. The few Irish and English cases subsequent to this case which apparently involve the question are not satisfactory. In the Irish case of *O'Rourke v. Percival*, 2 Ball. & Bat. 58 (1811), certain lands were settled on B. for life with joint power in B. and his wife to grant a lease for thirty-one years or three lives. A. had notice of the requirement that B.'s wife must join in the lease. B. agreed to grant to A. a lease for thirty-one years. A. asked specific performance of this agreement, being willing to accept such a lease as B. could give; namely, a lease for thirty-one years terminable on B.'s death. Following Lord Redesdale, Lord Manners seems to take the position that if B. is bound to convey as indicated, there is lack of mutuality in the contract, because B. could not make A. take such a lease as is proposed. He also believed that there was an attempt to commit a fraud on the settlement. In other words he dismisses the plaintiff's bill without deciding the exact meaning of the contract between the parties. In *Breeston v. Stutley*, 6 W. R. 206 (1858), a certain man held an underlease of land. His son agreed with the plaintiff that he would procure his father to surrender the lease, and that he, the son, would take a new and longer underlease, provided the plaintiff bought the leasehold. The plaintiff knew that the son had no legal power over his father. The father refused to surrender, and the plaintiff, having bought the leasehold, brought his bill against the son to make him take a lease from the expiration of the father's lease, and for compensation. It will be noted that the case is not exactly one of failure of title, the defect being known to the purchaser at the time of the contract; and yet it presents an analogous question. Vice-Chancellor Wood refused to allow specific per-

that the action of the court in dismissing the bill of the plaintiff vendee, when he knew of the defect in his vendor's title at the time of the contract, is due to some reason affecting performance with or without compensation, but he does say, that he will leave the plaintiff to his remedy in damages, and therefore it would seem as if he thought it arguable that the defendant is to be presumed to have undertaken to obtain his father's consent. Under the peculiar relations of the father and son, the son being the manager of the father's business, this is not perhaps an unreasonable supposition, the case being somewhat like those we will discuss presently, where a married man, known to the vendee to be married, contracts to sell his land.

In *James v. Lichfield*, L. R. 9 Eq. 51 (1869), A. agreed to purchase a freehold from B. A. knew at the time of the contract that C., a tenant, was in possession. A. brought his bill against B., alleging that he was entitled to a conveyance with compensation for that part of the property in occupation of the tenant. The court held that the plaintiff was not entitled to compensation. Lord Romilly reaches this conclusion by saying that the plaintiff "had constructive notice of the tenant's rights." He cites *Daniels v. Davison*, 16 Ves. 249 (1799), as authority for the proposition that the vendee, having notice of the tenant's possession, must respect the tenant's rights; and, by a process of reasoning not explained, he immediately deduces from this that the vendee cannot have compensation for such interest. Thus he does not discuss directly the meaning of the contract between the parties, though there is a practical assumption that if the vendee chooses to agree to take the land, after knowing of the tenant's rights, the vendor is only bound to convey a good title subject to such rights.

Another and better known English case is that of *Castle v. Wilkinson*, L. R. 5 Ch. App. 534 (1870). In this case B., a married woman, was possessed of an undivided moiety of certain lands, A. having the other moiety. B. and C., her husband, by an agreement with A., agreed to sell: "All that the moiety or equal one-half part of the said C. and B. his wife in right of the said C." Instead of fulfilling the agreement, B. and C. conveyed to D. A. brought his bill against D., B. and C., alleging that D. took with notice of his, A.'s, interest, and asking for a conveyance of C.'s interest in the moiety, with compensation for B.'s interest. It was admitted by all that the contract of the married woman was not enforceable against her; also, that the plaintiff had notice at the time he entered into the contract that the moiety was the property of the woman. The court dismissed the bill on the ground that C. never pretended to sell an interest which was not his to sell. Sir G. M. Gifford goes so far as to say: "All those cases in which the contract has been enforced partially, and a partial interest has been ordered to be conveyed, have been where the vendor represented that he could sell the fee simple and the purchaser has been induced by that representation to believe that he could purchase the fee simple." P. 537. Either one of two inferences can be drawn from this statement. One is that the court gives partial

the right to relief in equity, rather than because the court believes the vendor is under no obligation to convey unless he can procure a good title. It is unnecessary to point out

specific performance when the vendor has not the title he agreed to sell on some theory of deceit, which theory Gifford does not make sufficiently plain to discuss. The other inference is that in all cases where the vendor explains the weakness of his title at the time of making the contract, he only agrees to convey provided he can get a good title. If the court really meant to say that there was no obligation on the husband to convey, unless his wife conveyed, because that was the meaning of his contract, the peculiar facts of the case hardly warrant the inference, that in all cases where the vendee knows of the defect of the vendor's title at the time he made the contract, the vendor is under no obligation to convey unless he secures a good title. The case before the court was not one where A. agreed to sell land to which he had an imperfect title, B. knowing of the imperfections. It is more like the case of two joint owners agreeing to sell land, and the title of one proving defective, the other is asked to convey his share. In such a case the question arises whether one joint owner intended to be bound if the other could not convey. Even in such a case there is a reason for holding, as Lord Hardwick was inclined to do in *Attorney-General v. Day*, 1 Ves. Sr. 218 (1749), 224, that each joint owner was separately bound, which does not exist in the case where one of those interested in the estate has only a tenancy by the courtesy. As far as it goes, however, the case, but more the expressions used in the opinions, do tend to uphold Lord Redesdale's position, that if the vendee knows of the defects at the time of the contract there is no intention to bind the vendor to anything unless he can secure a good title.

These are the only English cases which the writer has been able to find bearing on the interpretation of the extent of the vendor's obligation when his defect of title, or the limited nature of his interests, is known to both parties at the time of the contract. There are, however, a few other references to the subject. In *Thomas v. Dering*, 1 Keen, p. 747 (1837), Lord Langdale assumes that a Court of Chancery will not give partial specific performance if the purchaser "at the time of the contract knew of the limited interest of the vendor." The point, however, was not before him, and he expressed no opinion as to whether the refusal of the court in such case is due to the fact that the vendor is under no obligation to obtain a good title, or whether the refusal of the court of equity to act is to be based on some reason which has nothing to do with the interpretation of the contract between the parties. The discussion in *Nelthorpe v. Holgate*, 1 Coll. Ch. 203 (1844), 215, over the question whether the plaintiff, at the time he agreed to purchase, knew of the defect in the vendor's title, would imply that partial specific performance with compensation would have been refused in that case had the court believed that the plaintiff had such notice. In *Hughes v. Jones*, 3 De G. F. & J. 307 (1861), both Lord Justice Knight-Bruce and Lord

that if a court believes the defendant contracted to perfect his title, there is no reason why they should not give the plaintiff partial specific performance with compensation as in other cases.

Justice Turner refused to decide what would have been the effect in that case of knowledge on the part of the vendee, at the time he made the contract of the defects in the vendor's title; Knight-Bruce apparently because the question was not before the court on appeal, and Turner because he found from the evidence that the vendee did not have notice of the defect in the title.

The American cases are somewhat more satisfactory, though even here it is curious to note how seldom the real nature of a contract, where the vendee knows of the defect in his vendor's title, has been discussed. In *Ten Broeck v. Livingston*, 1 Johns. Ch. 357, N. Y. (1815), the defect in the title consisted in the existence of a quit-rent charge of fifty-four cents per year. At the time of making the contract the defendant vendee knew of this rent. Chancellor Kent says, speaking of this knowledge, "It was never, then, within the contemplation of these parties, that this rent was to form an obstacle to title." P. 363. In *Winne v. Reynolds*, 6 Paige, 407, N. Y. (1837), the land in question was subject to a pre-emption right of purchase in the Patroon. This right was known to the purchaser at the time of entering into the contract. The court, though believing that ordinarily such a defect would require compensation, held, that as the purchaser knew of it, the contract meant that he was to take the title subject to the defect. P. 414. In *Bailey v. James*, 11 Grat. 468, Va. (1854), James, the plaintiff, agreed to sell to the defendant, Bailey, "all his right, title, claim and demand in said land, . . . one undivided seventh as a child and heir of John James the elder, and two other undivided sevenths, by purchase from . . . (two other persons) . . ." P. 469. Thus the vendor had only equitable interests under contract to the two-sevenths, and this fact was known to the purchaser. The contracts in question being with married women could not be enforced. The court held, that the purchaser, receiving the vendor's interests under the contracts, had received all he contracted for, and was therefore obliged to pay the full purchase price. P. 472. In the case of *Love v. Cobb*, 63 N. C. 324 (1869), the court regarded the plaintiff vendee as having known at the time of the contract that the vendor had no title. In dismissing the vendee's bill they say: "It is all the same, so far as this case is concerned, as if Cobb had said, in so many words, 'I will make you the title *provided* I can get it from Homesly.'" P. 326. This would indicate that the defendant, failing to obtain the land from Homesly, was not in default; and yet, the court immediately add, "and if he chose to deal under such circumstances, he must be left to his remedy at law." *Hurlbut v. Kantzler*, 112 Ill. 482 (1884), is a case in which a lessee agreed to assign a lease. The vendee knew that the assignment could only be made with the consent of the lessor. Subsequently, the lessor refusing to ratify the assignment, the lessee released

The vendor may not only be defeated by his inability to substantially perform his contract as made, but by his laches. The same principle which would prevent a defendant vendee

to the owner, who granted a new lease to a third person. Though the new lessee took with notice of the contract, his rights of course were not affected. The question whether the original lessee had broken his contract was not before the court; but the court assumes that the original lessee only undertook to convey provided the lessor consented. P. 489.

In the case of *Knox v. Spratt*, 23 Fla. 64 (1887), the Supreme Court of Florida went so far as to hold, that where the vendor exposed the defect in his title at the time of his sale, declaring that the same would be removed, specific performance, at least with compensation for the defect, would not be given. The indefinite language of the court, in respect to the court's discretion in giving specific performance, makes it doubtful whether they refused relief to the vendee because they believed there was no contract on the part of the vendor to do more than to make a reasonable effort to obtain a good title, or whether they refused the relief because they believed it was reasonable to refuse to exercise their discretion to enforce specific performance in such a case. In the case of *Chicago, Milwaukee & St. Paul Railroad v. Durant*, 44 Minn. 361 (1890), 365, the Supreme Court of Minnesota refer with approval to Mr. Waterman's statement, that where the vendee knows of the defect in his vendor's title at the time of the sale, "the sale was meant by the parties to include only such an interest as the vendor possessed." Waterman's Spec. Perf. § 506, ed. 1881. (For other statements in textbooks to the effect that the vendee's knowledge at the time of the contract prevents his having specific performance with compensation for the defect see: Waits' Acts. and Defs., Vol. 5, pp. 780-781 (1878); Pomeroy Spec. Perf. 442, ed. 1897. Compare statement in Fry, Spec. Perf., §1266, ed. 1892, with *ib.*, §§1271, 1272.) The reason for this refusal on the part of the courts of equity is not discussed.

The only equity case known to the writer which seems to assume that the vendor undertakes to make a good title, though he has not expressly promised to do so, and the defect was known to the vendee, is a case in a county court of Pennsylvania, *Rankin v. Hammond*, 25 Pa. C. C. 45 (1900). There the purchaser knew at the time he made the contract that the vendor had no title to the oil and gas or other minerals contained in the land. The court assumed that the defendant who executed a deed excepting such rights had not fulfilled his contract. They refuse to award specific performance with compensation, for the sole reason that at the time the plaintiff brought the bill, the defendant offered to perform the contract as far as he was able, and therefore the plaintiff could have accepted the deed offered, sued at law for damages, and obtained all the court of equity could now give him.

The cases just referred to are all that the writer has been able to discover. The paucity in authority is probably due to the fact that most vendees, finding the title of their would-be vendors defective, insist that

whose title is defective from invoking the rule requiring mutuality of remedy in equity, should prevent him raising his own laches as a defence, even though that laches is sufficient

there be inserted in the contract of sale an express promise on the part of the vendor to convey a good title. Of course in such a case the meaning of the contract is plain. See *Barker v. Cox*, L. R. 4 Ch. D. 464 (1876). Few as they are the cases are not satisfactory. Though all refuse specific performance with compensation, if the vendee knew of the defect at the time he entered into the contract, there is, as we have seen, some disposition to place the refusal on the vague ground that the relief asked by the plaintiff lies in the discretion of the court, or as in the English case of *Castle v. Wilkinson*, to refuse the relief without any real explanation.

The half-expressed idea contained in some of the cases mentioned, that irrespective of the plaintiff's rights at law he cannot have relief in equity where he knew of the defects at the time of the contract, is, we believe, a survival of the indefinite idea of the eighteenth century that Chancery, being a court of conscience, required a contract to be free from unfairness in a way not required at law. In a previous Paper [49 A. L. R. 270 (1901)] it has been shown that this feeling once caused courts of equity to refuse to enforce contracts in which one party held an option; there was, so it was thought, an element of lack of mutuality of obligation; a want of that fairness which equity demands. So in the case where the vendee knew that his vendor at the time of the contract had not a good title, even though the vendor undertakes to make it good, there is an element of want of mutuality in obligation, a taint of unfairness, because the vendee knows that his vendor may be unable to obtain a good title. The idea that a court of law may look at a contract as fair, which a court of equity practically regards as unfair, is responsible for a good deal of confusion of thought. Suppose B. agrees to sell to A. what both parties know is not at the time in B.'s possession, but B. undertakes at his own risk to secure and deliver the subject of sale. On a failure by B. to perform his promise, the real question is whether the contract is against public policy, and this question is necessarily the same whether the question is discussed at law or in equity. With this question of policy this note does not pretend to deal.

Turning to the question of the proper interpretation of the meaning of the contract, where the vendor has not expressly promised to convey a good title to the land sold, apart from authority, it appeals to the writer, that if the vendor exposes the fact that he has a defect in his title which he has no legal power to remove, that he should not be held to warrant his ability to cure the defect by mere evidence that he assumed to contract for the sale of the land. If the defect is slight, then is not a court justified in regarding the vendee as having agreed to take such title as the vendor can give? The early New York cases are examples of slight defects, and the opinion expressed is in accordance with those decisions. Another example would be where the vendee knew that the land was

to prevent him obtaining specific performance of the plaintiff's obligation to buy. In only one case, as far as is known to the writer, has a defendant, whose laches would

leased to a good tenant at a reasonable rental, for here, though the lease may be considered as a technical defect in title, practically it is, under the circumstances indicated, usually a benefit. If the defect is serious there is all the more reason to infer that the parties did not understand that the vendor undertook at his own risk to cure the defect; but, on the other hand, there is no reason to suppose that the vendee undertook to purchase a title which he knew to be seriously defective, and therefore if the vendor has failed to obtain a good title, the contract is at an end.

A defect in title to land means that there is some person, other than the vendor, who has an interest in or claim on the land. In nearly all the cases so far examined this outside claimant is a stranger to the vendor. Where the vendor, though having no legal control over the person who has the claim on the land, may be presumed to have a strong practical control, there is every reason for the court to presume that the vendor contracted to procure the concurrence of this third person. Thus in the case of husband and wife, if a married man contracts to sell his land, though the vendee knows him to be married, he has a right to presume, in the absence of positive evidence to the contrary, that his vendor has secured, or at least undertakes at his own risk to secure, the joinder of his wife. This is the construction put by the courts upon such contracts. In the following cases the vendee, having failed to secure his wife's consent to join in the deed, was made to convey his own interest with compensation for the wife's inchoate right of dower: *Springle v. Shields*, 17 Ala. 295 (1850); *Hazelrig v. Hutson*, 18 Ind. 481 (1862); *Woodbury v. Luddy*, 14 Allen, 1, Mass. (1867); *Peters v. Delaplaine*, 49 N. Y. 362 (1872); *Zebley v. Sears*, 38 Ia. 507 (1874). See also *Wingate v. Hamilton*, 7 Ind. 73 (1855), and *Wright v. Young*, 6 Wis. 127 (1858), where the court provided for compensation in case the wife of the vendor refused to sign, though there was no evidence before them that she would refuse. In *Troutman v. Gowing*, 16 Ia. 415 (1864), the action of the lower court was reversed on the ground that the estimate of the amount of compensation to be given to the vendee for the wife's dower was based on an erroneous principle. In *Young v. Paul*, 10 N. J. Eq. 401 (1855), the refusal of the wife to join being at the instigation of the husband, the vendee was given specific performance with indemnity.

In the following cases specific performance with compensation was refused, not because the defendant was not in default for the failure to procure the joinder of his wife, but because there was, in the opinion of the court, no way to estimate the compensation to be paid the vendee: *Phillips v. Stauch*, 20 Mich. 369 (Ignored by the assumption in *McCord v. Massey*, 155 Ill. 123 (1895), that the proper compensation could be ascertained). *Sed quaere Ebert v. Arends*, 190 Ill. 221 (1900), 234. In *Clark v. Seirer*, 9 Watts, 107 Pa. (1838), 110, 111, Judge Gibson took the position that where A. contracted with B. a married man to buy B.'s

have prevented him from having specific performance, had the temerity to raise the defence of want of mutuality. This was in the case of *Walton v. Coulselon*.²⁰ The court per-

land, and B.'s wife refused to join in the deed, while A. could have such specific performance as B. could give, he could not have compensation for the wife's right of dower, because this would be making a new contract for the parties. His position is one which would apply, and would seem by Judge Gibson himself to have been applied, to all partial specific performance with compensation. Judge Gibson refers to this decision with approval in *Shurtz v. Thomas*, 8 Pa. 359 (1848), 363. Lewis, J., in *Weller v. Weyand*, 2 Grant, 103 Pa. (1853), 104, says: "A vendee, under articles of agreement, is not entitled to a specific performance where the wife refuses to convey." He cites *Clark v. Seirer*, but there is no explanation for the ground of the opinion. In Riesz's Appeal, 73 Pa. 485 (1873), 490, Judge Sharswood places the refusal to permit specific performance in such a case, with compensation for the wife's right of dower, on the ground that this would be indirectly coercing the wife, and "The same sound policy which forbids a decree for the execution of a deed by the husband—to be enforced by his imprisonment if he cannot obey—prevents any decree looking to compensation, abatement or indemnity." It will be noted that this is a distinctly different ground than that on which Gibson had placed his refusal. Judge Sharswood's opinion has been followed and may be considered settled law in the State: *Burk's Appeal*, 75 Pa. 141 (1874), 147; *Burk v. Serrill*, 80 Pa. 413 (1876), 418; *Huffman v. Bradshaw*, 17 Pa. C. C. 205 (1900), 207. In New Jersey the Court of Chancery expressed in *Hawratty v. Warren*, 18 N. J. Eq. 124 (1866), 128, a thought similar to that of Judge Sharswood in Riesz's Appeal, and again in *Reilly v. Smith*, 25 N. J. Eq. 158 (1874), 159, where Riesz's Appeal is cited. It need not be pointed out that there is a great difference between ordering a husband to compel his wife to join in a conveyance or go to prison, and ordering him to submit to a deduction of the purchase because his wife will not join. The writer does not know of any other jurisdiction where the idea of Riesz's Appeal is adopted.

Of course where the vendor expressly promises to procure the joinder of his wife no question can arise but that he is liable for not doing so. See, for example, *Wilson v. Williams*, 3 Jur., N. S., Pt. 1, 810 (1857), where indemnity against the inchoate right of dower was given the plaintiff vendee; also *Davis v. Parker*, 14 Allen, 94, Mass. (1867); *Barker v. Cox*, L. R. 4 Ch. D. 464 (1876). On the other hand, where there is positive evidence that the husband would not have signed the contract to convey if he had thought he was undertaking to secure his wife's concurrence, he cannot be made to convey at all if his wife refuses to concur: *Peeler v. Levy*, 26 N. J. Eq. 330 (1875); *Lucas v. Scott*, 41 O. St. 636 (1885).

²⁰ McClean, 120, U. S. Cir. Ct. Tenn. (1831), 129.

nently pointed out that the argument "would enable a vendor to defeat any contract, by taking advantage of his own negligence." It will be noted that the case for the plaintiff is even stronger than where there is a defect in title or in the quantity or quality of the land sold. In the latter case the defect exists at the time the contract is made. It is usually unknown to the vendor, and, where it is known, he may be presumed to have honestly thought he could cure the defect before the time came for conveyance.²¹ But in the case where the laches of the defendant is such that he cannot obtain specific performance, the laches being a voluntary act on his part, he must be regarded as having created the condition which would prevent him from being able to make the plaintiff accept the land.²²

William Draper Lewis.

²¹ Sometimes failure of title is due to the act of the vendor after the contract: See *Waters v. Travis*, 9 Johns. 450, N. Y. (1812). The case of *Young v. Paul*, 10 N. J. Eq. 401 (1855), also presents the same strong case against the defendant, as there he persuaded his wife not to join in the deed in order to prevent the plaintiff obtaining a good title. See Paper on "Damages in Lieu of Specific Performance," to be published in the July number.

²² See also *Turner v. Moy*, 32 L. T., n. s., 36 (1875). In that case there was a bill for specific performance of a contract to award shares in a contemplated company. The promoters of the company changed the amount of capital stock and the scope of the company to such an extent that it is doubtful if they could have forced the plaintiff to take the stock. The court refused to decide whether the defendant could have had specific performance, but treated the defense of want of mutuality, under the circumstances of the case before them, with contempt. See for *dicta* to the same effect, *South-Eastern R. R. Co. v. Knott*, 10 Hare, 122 (1852), 125, 126.